Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

No._____
October Term, 1996

MW AG, INC., RICHARD FIELD and
CLARK FIELD,

Petitioners,

v.

NEW HAMPSHIRE INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Lawrence Herman Crosby
Counsel of Record
CROSBY & ASSOCIATES
Attorneys for Petitioners
630 Roseville Professional Center
2233 Hamline Avenue North
St. Paul, Minnesota 55113
(612) 635-0818

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QUESTIONS PRESENTED FOR REVIEW

I: Whether the decision of the Eighth Circuit Court of Appeals conflicts directly with case law from the State of Minnesota which holds that service by mail under the Minnesota long-arm statute is effective where the defendant actually receives the summons and complaint as evidenced by a certified mail receipt; and, whether this constitutes delivery under Rule 4.03(a) and the statute, *Stonewall Insurance Co. v. Horak*, 325 N.W.2d 134 (Minn. 1982)?

II: Whether it is incongruous and unjust for a party-litigant to falsely-identify a person as an agent for service of process and then to have the right to claim insufficient service of process when this same identified person has been served with the summons and complaint?

III: Whether filing a counterclaim should stand as a waiver of any claim of insufficiency of service of process?

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PETITION FOR A WRIT OF CERTIORARI

MW Ag, Inc., Richard Field and Clark Field respectfully petition for a writ of Certiorari to the United States Court of Appeals for the Eighth Circuit in this case. That opinion is reported at 107 F.3d 644 (1997). The opinions of the district court are unreported.

OPINIONS BELOW

Petitioners-MW Ag and the Fields seek review of a reported decision of the United States Court of Appeals for the Eighth Circuit filed February 26, 1997. The District Court had entered its judgments on November 22, 1995, and April 4, 1996.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V of the Constitution of the United States provides that "No person shall be * * * deprived of * * * property without due process of law."

STATEMENT OF THE CASE

This Petition raises fundamental questions concerning effective service of process where a litigant has misstated the identity of an agent for service of process and where the defendant has later waived its right to assert insufficiency of process when the defendant had been judicially authorized to

file a counterclaim in the same matter.

The decisions in the present litigation from the United States District Court for the District of Minnesota and the United States Court of Appeals for the Eighth Circuit controvert the Minnesota Rules of Civil Procedure and decisions from the appellate Courts of the State of Minnesota and the State of New York.

Before filing suit, Counsel for MW Ag requested the identity of the agent for service of process for the New Hampshire Insurance Company from the New Hampshire Insurance Company itself; New Hampshire responded that one P. Foley was its agent for service of process. New Hampshire later claimed that although the address may have been accurate, the actual agent for service of process was an Elizabeth Tuck. No one questions that New Hampshire actually received the summons and complaint.

New Hampshire also, later, asked permission to file a counterclaim against the Field brothers and MW Ag, Inc. The district court allowed this amendment.

COURSE OF PROCEEDINGS

The New Hampshire Insurance Company removed the action from Minnesota state court to federal district court where the United States District Court for the District of Minnesota dismissed Plaintiffs' claims for an ostensible failure to bring the action within the two years permitted under an insurance contract.

The Eighth Circuit affirmed the District Court, reasoning that P. Foley was not an authorized agent for

service of process, that process had not been sufficient under Minnesota law, and that waiver of the contractual statute of limitations did not apply to this case.

REASONS FOR GRANTING THE WRIT

I: The decision of the Eighth Circuit Court of Appeals conflicts directly with case law from the State of Minnesota which holds that service by mail under the Minnesota long-arm statute is effective where the defendant has actually received the summons and complaint as evidenced by a certified mail receipt; this constitutes delivery under Rule 4.03(a) and the statute, *Stonewall Insurance Co. v. Horak*, 325 N.W.2d 134 (Minn. 1982). The same result is required under New York law.

The Affidavit of Lawrence Crosby indicates that New Hampshire itself declared that P. Foley served as the agent for service of process with respect to Minnesota litigation. This matters, particularly given the precept that the facts should be deemed true in favor of the person opposing summary judgment. New Hampshire Insurance Company cannot seriously claim that now another person is the real agent for service of process.

Service by mail on an identified agent for service of process may be obtained by mailing the summons and complaint with an ascertainable means, such as return receipt requested, of determining that the papers were actually received.

The 1985 Advisory Committee Note to the Minnesota Rules of Civil Procedure, Rule 4, holds that service by mail

under the Minnesota long-arm statute, Minnesota Statutes, Section 543.19 (1980), where there has been actual receipt of the summons and complaint by mail as evidenced by a certified return receipt, constitutes effective service under the Rule and the Statute, *Stonewall Insurance Co. v. Horak*, 325 N.W.2d 134 (Minn. 1982). This particular decision reflects an equitable understanding that functional notice of a lawsuit counts more than simply meeting legal niceties.

The Eighth Circuit completely disregarded this Minnesota case and its Advisory Committee Note.

Also, there is a federal case on point which analyzes the same issue, *Morse v. Elmira Country Club*, 752 F.2d. 35 (10th Cir. 1984):

> Above all, strong factors of justice and equity push toward reading Rule 4(c) as providing for effective mail service where, as here, the recipient actually receives the mail service but refuses to acknowledge it properly. We have been given no adequate explanation why the acknowledgment was withheld here, nor any proper basis for nullifying mail service deliberately left unacknowledged. Certainly, the desire to harass or inconvenience the plaintiff, or to delay the tolling of limitation, should not be an excuse or reason to interpret the rule against plaintiff. There is, in other words, no rationale for allowing a properly served defendant deliberately and willfully to postpone the ending of limitation by simply refusing to do what the rule calls upon him to do.

New York law allows the service made on P. Foley, *Lee v. Carlson*, 645 F.Supp. 1430 (S.D.N.Y. 1986):

> Service in this case, however, differs from the service in *Morse* because here the plaintiff failed to include an acknowledgment form and an addressed prepaid return envelope with his service. However, this does not vitiate the effectiveness of the service because the court's holding in *Morse*, that mail service is effective when the recipient receives the summons and complaint and accordingly has actual notice, clearly emphasizes that the effectiveness of the service depends on the receipt of the summons and complaint, not on the supplementary material to be signed and returned by the recipient which, by itself, establishes proof of service. Failure to include these does not render the service ineffective. The defect can be cured by an admission, or other proof, that in fact the summons and complaint were received.

Also, in *Kitchens v. Bryan County Nat. Bank*, 825 F.2d 248 (10th Cir. 1987), the Court again considered an allegation of failure of service of process:

> Assuming arguendo, that process was ineffective under Oklahoma law, still there was no requirement that service be made in accordance with Oklahoma law. The Federal Rules of Civil Procedure allow several methods of affording notice to defendants, only one of which is dictated by state law. We note that service of process in the instant case complied with the spirit, if not the letter of the Fed. R. Civ. P. Rule 4. There is no question that Bill Mill, the president of the Bank, was a proper person to be served pursuant to Rule 4(d)(3). And although it appears from the record that only a copy of the summons and complaint were mailed and that the

> "notice and acknowledgment" and return envelope prescribed by Rule 4(c)(2)(C)(ii) were omitted "the federal courts generally take a permissive attitude towards the mechanism employed for service of process when defendant actually receives notice." Wright and Miller, 4 Federal Practice and Procedure 1074 at 295; *Nowell v. Nowell*, 384 F.2d. 951 (8th Cir. 1967), cert denied, 390 U.S. 956, 88 S.Ct. 1053, 19 L.Ed.2d. 1150 (1968).

In the present MW Ag case, the defendant received actual service of the summons and complaint: According to the Affidavit of Lawrence Crosby, P. Foley received the papers the day following their mailing according to the green return receipt postcard mailed back to Mr. Crosby's office. Neither Foley nor New Hampshire deny that Foley (or New Hampshire for that matter) actually received the summons and complaint. "Give me the letter of the law?", cries New Hampshire.

The fact that no acknowledgment form had been supplied with the summons and complaint is inconsequential. The Court in *Hoerning v. Stihl American, Inc.*, 416 N.Y.S.2d. 395 (1979), considered this:

> While there were numerous failures to comply with the statue, we are of the view that they are mere irregularities and did not deprive the Court of jurisdiction (see *Montana v. Incorporated Village of Lynbrook*, 23 A.D.2d. 585, 256 N.Y.S. 2d. 651). We recently held that failure to file proof of service is an irregularity curable by motion if, under the facts, the court in the exercise of its discretion deems it best (*Reporter Co., Inc. v. Tomicki*, 60 A.D. 2d. 947, 401

N.Y.S. 2d. 322). We also reject defendant's contentions that failure to mail the complaint to defendant and failure to serve defendants with notice of service on Secretary of State are jurisdictional.

II: It would be incongruous and unjust for a party to litigation to falsely identify a person as an agent for service of process and then have the right to claim insufficient service of process when this same person has been served with the summons and complaint.

A simple estoppel analysis should be followed. There is no evidence from New Hampshire that Lawrence Crosby had been advised of any agent-for-service of process other than Mr. P. Foley. Mr. Foley actually received the summons and complaint as shown by the returned post card. The fact that Mr. Foley's address comports completely with Mrs. Tuck's address is also evidence that Mr. Crosby had been misled, perhaps inadvertently. Any disallowing of P. Foley as the agent for service of process would allow New Hampshire to benefit from its own inadvertence or its own underhandedness.

III: Filing a counterclaim should stand as a direct waiver of any claim to insufficiency of service of process.

The federal Magistrate erred in thinking that relation back should not apply under the facts of this case when New Hampshire derived a substantial benefit from its counter-claim. New Hampshire could not have sued under the facts of this case to assert its own rights. However, when New Hampshire requested and received the right to amend its responsive pleadings, New Hampshire should have been required to waive its insufficiency of process defense. There

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is no reason why New Hampshire might be timely in its claims when it asserts that MW Ag and the Fields were not. Numerous case agree with this analysis: For example, in *Hendrix v. Memorial Hospital*, 776 F.2d. 1255, 1258 (5th Cir. 1985), the new defendant had same mailing address and attorneys as original defendant. In *Kirk v. Cronvich*, 629 F.2d. 404, 407 (5th Cir. 1980), the same attorney who represented original defendant also represented new defendant, the sheriff's office, throughout the litigation. In *Montalvo v. Tower Life Bldq.*, 426 F.2d. 1135, 1147 (8th Cir. 1970), the new defendant's attorney filed answer to the original complaint, so it follows that defendant must have received adequate notice of the institution of the suit. In *Ramirez v. Burr*, 607 F.Supp. 170, 174 (S.D. Tex. 1984), the court decided that service to a director of a board provided notice to individual board members, especially since all were represented by same counsel. In *Morrison v. LeFevre*, 592 F. Supp. 1052, 1057-58 (S.D.N.Y. 1984), prison officials added to a lawsuit had notice through their attorney shared with the prison officials named in original complaint.

This Court should remember that Mr. Baxter is no stranger to the interactions between Clark Field and the New Hampshire Insurance Company. Mr. Baxter had been intimately involved in representing New Hampshire from the time shortly after the tornado struck Clarkfield.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated at St. Paul, Minnesota, this 27th day of May, 1997.

Lawrence Herman Crosby
Counsel of Record
CROSBY & ASSOCIATES
Attorneys for Petitioners
630 Roseville Professional Center
2233 Hamline Avenue North
St. Paul, Minnesota 55113
(612) 635-0818

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2239

Appeal from the United States District Court
for the District of Minnesota

MW Ag, Inc., Richard Field and Clark Field,
Appellants,

v.

New Hampshire Insurance Company.
Appellee.

Submitted: December 9, 1996
Filed: February 26, 1997

Before BOWMAN and LAY, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. (FN*)

Appellants appeal the order of the District Court (FN1) granting appellee's motion for summary judgment. The facts of the case are not in dispute.

Appellee New Hampshire Insurance Company ("New Hampshire") was the property insurer for Clarkfield Drying for the period July, 1991 to July, 1992. In September 1991, Clarkfield Drying filed a Chapter 7 bankruptcy petition.

Richard and Clark Field, principals of Clarkfield Drying, leased the drying plant to MW Ag, Inc. Richard and Clark Field are principals of that corporation as well. MW Ag continued to pay the insurance premiums to New Hampshire in order to continue insurance coverage on the property.

On June 16, 1992, a tornado hit the city of Clarkfield, causing extensive damage to the drying plant. The Chapter 7 bankruptcy trustee instituted adversary proceedings against New Hampshire demanding insurance proceeds for the property damage. New Hampshire paid $453,870.68 into the Bankruptcy Court. The trustee retained the monies and assigned the bankruptcy estate's *646 remaining rights under the policy to the Fields and MW Ag (collectively "MW Ag"). MW Ag, as assignee of the insurance policy, demanded more money from New Hampshire. MW Ag, through its attorney, participated in ongoing negotiations with New Hampshire, represented by its attorney Michael Baxter ("Baxter").

Because the insurance policy mandated that a suit under the insurance policy must be brought within two years of the date of the actual loss (the "contractual limitation") (FN2), when MW Ag's discussions with New Hampshire failed to result in a satisfactory settlement, MW Ag drafted a lawsuit against New Hampshire to collect the monies allegedly due under the contract. The lawsuit was to be brought in Minnesota state court. MW Ag called New Hampshire's legal department to inquire as to the name and address of New Hampshire's agent for service of process and was informed that P. Foley was the proper agent for service and was given Foley's address. Therefore, on June 13, 1994, MW Ag mailed by express mail the complaint and summons to P. Foley. On June 14, 1994, MW Ag delivered a copy of the complaint and summons to Baxter and mailed a copy of the complaint and summons to an insurance investigator with the state of Minnesota.

P. Foley was not in fact the agent for service of process for New Hampshire. The proper agent was Elizabeth M. Tuck, who was located, coincidentally, at Foley's same address.

On July 11, 1994, New Hampshire removed the suit to federal court and on July 21, 1994, filed an answer asserting insufficient service of process as a defense. On December 29, 1994, New Hampshire was granted leave to amend its answer and to assert a counterclaim. On November 22, 1995, the district court entered summary judgment in New Hampshire's favor dismissing the case for failing to commence the lawsuit within the two year contractual limitation period.

STANDARD OF REVIEW

We review a District Court's grant of summary judgment de novo, applying the same standards as the District Court. See Disesa v. St. Louis Community College, 79 F.3d 92, 94 (8th Cir.1996). Thus, the District Court's decision is affirmed if, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

COMMENCEMENT AND SERVICE OF PROCESS

The issue before this court is whether MW Ag's action against New Hampshire was commenced within the two year contractual limitation period by properly serving New Hampshire with process.

Federal courts follow state substantive law to determine when an action is commenced for statute of limitations purposes. Walker v. Armco Steel Corp., 446 U.S. 740, 752-753, 100 S.Ct. 1978, 1986, 64 L.Ed.2d 659 (1980).

Under Minnesota law an action is "commenced" by service of the summons on a defendant, by acknowledgment of service or by delivery to the sheriff. Minn.R.Civ.P. 3.01. Here, MW Ag contends that its action against New Hampshire was commenced within the two year contractual limitation period because New Hampshire was properly served with the summons and complaint within that time period.

Minnesota Rule of Civil Procedure 4.03 allows for personal service upon a foreign corporation by delivering a copy of the summons and complaint to an agent authorized to receive service of summons. Rule 4.05 allows for service by mailing a copy of the summons and complaint to the person to be served together with a notice and acknowledgment form. The rule specifically provides: "If acknowledgment of service under this rule is not received by the sender within *647 the time defendant is required by these rules to serve an answer, service shall be ineffectual."

First, MW Ag contends that by mailing the summons and complaint to P. Foley, whom MW Ag was led to believe was New Hampshire's registered agent, service was properly effected on June 13, 1994 and the lawsuit was commenced. It is undisputed, however, that P. Foley was not New Hampshire's registered agent for service of process. It is also undisputed that MW Ag did not provide P. Foley with the required acknowledgment form and did not receive an acknowledgment of service from New Hampshire. Thus, it is clear that service is ineffectual under Minnesota's rule. This is true even in those cases where defendant never returned acknowledgment of service but had actual notice of the lawsuit and admitted that it received two summonses and complaints but made a corporate decision not to cooperate in service of process. See Coons v. St. Paul Companies, 486 N.W.2d 771 (Minn.Ct.App.1992). In these instances, plaintiff must secure personal service to obtain jurisdiction. Thus, the

service by mail on P. Foley was not sufficient service of process to commence a suit under Minnesota law.

Second, MW Ag argues that the delivery of a copy of the summons and complaint to Baxter, New Hampshire's attorney, was effective service of process. There is no evidence in the form of an affidavit or otherwise from the delivery service establishing that the summons and complaint were in fact delivered to Baxter on June 14, 1994. Further, there is no support for MW Ag's position that Baxter is an "agent authorized expressly or impliedly ... to receive service of summons" merely because Baxter negotiated with MW Ag on behalf of New Hampshire. Finally, although New Hampshire acknowledges that at some time Baxter received a copy of the summons and complaint, such receipt does not constitute actual notice that would obviate the need for sufficient service of process. *Coons v. St. Paul Companies*, 486 N.W.2d 771 (Minn.Ct.App.1992).

Alternatively, MW Ag argues that service of process was sufficient under New York law. However, CPLR 312-a (1993), which governs service of process in New York state court, is not unlike Minnesota practice which requires the receipt of an acknowledgment of service from the defendant before service by mail is completed. Although an action is commenced in New York upon the filing of the complaint with the court clerk, service by mail is not sufficient until the plaintiff receives and files defendant's acknowledgment of service. CPLR 312-a(b). Thus, the actions taken by MW Ag to effect service of process on New Hampshire are not sufficient under New York law.

WAIVER

MW Ag contends that the alleged insufficiency of its service of process on New Hampshire was waived by the

actions of New Hampshire--first, when the action was removed by New Hampshire to federal court; second, when New Hampshire filed its answer to the complaint; or third, when New Hampshire filed an amended answer and asserted a counterclaim against MW Ag.

While it is true that New Hampshire's assertion of a counterclaim against MW Ag may have constituted a waiver of the insufficiency of service of process, that waiver occurred in December 1994--after the critical date of June 16, 1994 (the contractual limitation date). MW Ag argues that the waiver should relate back to either the date the summons and complaint were mailed to New Hampshire (June 13, 1994) or the date that the summons and complaint were delivered to Baxter (June 14, 1994).

This Court agrees with the District Court that where service of process is not effected upon the defendant, but where a defendant waives that defect, an action is commenced for statute of limitations purposes on the date upon which the action resulting in the waiver took place. In following that rule, all of the actions taken by New Hampshire which MW Ag contends constituted a waiver of insufficient process are irrelevant to this case because all of those actions were taken after June 16, 1994. Therefore, although any of those actions may have constituted *648. a waiver, the suit brought by MW Ag was not commenced within the contractual limitation period. As such, summary judgment is appropriate in this case.

Therefore, the decision of the District Court is affirmed.

FN* The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri, sitting by designation.

FN1. The Honorable John M. Mason, United States Magistrate Judge for the District of Minnesota. The parties consented to jurisdiction before the United States Magistrate Judge pursuant to F.R.C.P. 73.

FN2. The contract provides:

> No one may bring a legal action against us under this coverage Part C unless:
>
> 1. There has been full compliance with all of the terms of this coverage part; and
> 2. The action is brought within two years after the date on which the direct physical loss or damage occurred.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MW AG, INC., et al., CIVIL NO. 3-94-775

Plaintiffs,

v. ORDER

NEW HAMPSHIRE INSURANCE COMPANY,

Defendant.

Pursuant to the provisions of 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure, the parties have duly waived their right to proceed before a Judge of the United States District Court and have consented to have a United States Magistrate Judge conduct any and all proceeding in the case, including the trial, and the entry of a final judgment. District Court Judge Michael J. Davis has ordered the case referred to this Court based thereon. This matter is now before the Court upon the Motion of Defendant for Summary Judgment, or to Dismiss, and the Motion of Plaintiffs to Compel Discovery.

The Court, being duly advised in the premises, upon all of the files, records and proceedings herein, now makes and enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

On a motion for summary judgment, "the court is required to view the facts in the light most favorable to

the party opposing the motion and to give that party the benefit of all reasonable inferences to be drawn from the underlying facts disclosed in pleadings and affidavits filed in the case." Vette Co. v. Aetna Cas. & Sur. Co., 612 F.2d 1076, 1077 (8th Cir. 1980); see also Veldhuizen v. A.O. Smith Corp., 839 F.Supp. 669, 674 (D.Minn. 1993). Summary judgment is proper only if examination of the evidence in the light most favorable to the non-moving party reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Only genuine disputes over material facts (i.e. facts that might affect the outcome of the suit) are relevant on summary judgment. Anderson, 477 U.S. at 252; Lomar Wholesale Grocery, Inc. v. Dietees Gourmet Foods, Inc., 824 F.2d 582, 585 (8th Cir. 1987), cert. denied, 484 U.S. 1010 (1988). A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. Anderson, 477 U.S. at 252.

Background

Clarkfield Drying, Inc. operated a drying plant in southern Minnesota. It leased its drying equipment from Clark and Richard Field, Plaintiffs herein. In July, 1991, Defendant New Hampshire Insurance Company issued a policy of insurance to Clarkfield Drying, Inc. and Mr. Clark Field. In the fall of 1991, Clarkfield Drying, Inc. filed a Petition for Chapter 7 Bankruptcy. The bankruptcy trustee did not assume the lease on the drying machinery. The Fields leased the drying equipment to Plaintiff MW Ag, Inc., a corporation in which they are the principal shareholders. MW Ag, Inc. then ran the drying operation. The Complaint alleges that in January of 1992, MW Ag,

Inc. paid a premium to New Hampshire Insurance Company to keep the policy in effect.

On June 16, 1992, a tornado swept through Clarkfield, Minnesota, c.%using substantial damage to the property allegedly insured by New Hampshire Insurance Company. Since Clarkfield Drying, Inc. had filed a Bankruptcy Petition, the bankruptcy trustee made a claim under the policy. Defendant paid $453,870 on that claim. Plaintiffs claim that there are additional losses covered by the policy which they are entitled to recover.

Procedural History

Plaintiffs attempted to commence this action by the service of process as more particularly described below. Defendant filed a Petition for Removal to this Court, upon the ground that there is complete diversity between Plaintiffs, residents of Minnesota, and Defendant, which is a New Hampshire Corporation. (The Notice of Removal states that Plaintiffs "attempted to commence an action" against the Defendant in the state courts of Minnesota.) Count One of the Complaint alleges breach of contract. Plaintiffs Clark and Richard Field claim that they are the assignees of the rights of Clarkfield Drying, Inc. under the insurance policy, and that there are additional amounts due for losses suffered from the tornado. Count Two alleges negligence, and Count Three alleges bad faith refusal to settle.

The initial Answer of Defendant [Docket No. 2] and its Amended Answer assert the defense of insufficiency of service of process under Rule 12(b)(5) of the Federal Rules of Civil Procedure, and that it was barred by the statute of limitations. By Order dated December 29, 1994, [Docket No. 14], Defendant was allowed to amend its Answer to assert a Counterclaim against Plaintiffs. The counterclaim alleges that estimates and bids submitted by Plaintiffs to recover under the policy were false, and known to be false

1. **SUFFICIENCY OF SERVICE OF PROCESS**

This Court may exercise jurisdiction over Defendant as a foreign corporation transacting business in Minnesota. M.S.A. § 543.14, subd. 1(b). However, it has jurisdiction only if the Summons and Complaint were properly served, unless there was a waiver. Amdahl v. Stonewall Ins. Co., 484 N.W.2d 81 1, 814 (Minn. Ct. App. 1992), McBride v. Bitner, 310 N.W.2d 558, 563 (Minn. 1981).

In Minnesota, an action may be commenced by the service of a summons upon the defendant, or by acknowledgment of service, or by delivery to the Sheriff. ~~Rule 3.01~~ of the Minnesota Rules of Civil Procedure. Plaintiffs do not contend that there was acknowledgment of service, nor that the Summons was delivered to the Sheriff, but rather that they attempted service in three ways, each of which is discussed below.

Local Rule 5.2 of this Court does not require the filing of an Affidavit of Service with a pleading 'unless an adverse party raises a question of notice or timeliness.' In response to Defendant's motion, Plaintiffs filed only the Affidavit of Lawrence Crosby [Docket No. 23] for the purpose of establishing the facts which respect to service of process upon Defendant. That Affidavit contains little direct evidence and much hearsay evidence of the facts as to service.

A. Service Pursuant to Statute.

Under Minnesota law, a lawsuit may be commenced against an insurance company by substituted service. See M.S.A. § 543.08; § 45.028(2). In order to be effective under this statute, a party must leave a copy with the Commissioner of Insurance, send Notice to the Defendant, and a copy of the process by Certified Mail, and file an Affidavit of Compliance before the return day for service of the response. Plaintiffs did not comply with this statute.

They mailed a copy to an insurance department investigator, rather than leaving a copy with the Commissioner; no notice of such service was sent to the Defendant, by certified mail or otherwise; and no Affidavit of Compliance was filed. Accordingly, the provisions of these statutes do not provide this Court with jurisdiction.

B. Service By Mail.

On June 13, 1994, Plaintiffs mailed a copy of the Summons and Complaint to P. Foley, of American International Group, 70 Pine Street, New York, New York 10270, by Express Mail, Return Receipt Requested. Even if the Court were to accept as true the assertion in the Affidavit of Lawrence Crosby, Esq. that Mr. Foley received it June 14, 1994, (the "Domestic Return Receipt" to which Mr. Crosby refers to support this assertion was not attached to his Affidavit) and even if Mr. Foley were an officer or agent of Defendant authorized to accept service, (a point which is disputed and which Plaintiffs did not substantiate) this mailing would not constitute service of process under any statute or rule. Rule 4.05 of the Minnesota Rules of Civil Procedure allows service by mail, but the requirements of that rule were not observed by Plaintiffs, and no acknowledgment of service was made. Service under Rule 4.05 was ineffectual. Coons v. St. Paul Companies, 486 N.W.2d 771, 774 (Minn. App. 1992); Gulley v. Mayo Foundation, 886 F.2d 161, 165-66 (8th Cir. 1989).

C. Delivery to Attorney''s Office.

Plaintiffs contend that service of process was effected by serving an attorney who had represented Defendant in pre-litigation negotiations. They contend that this constituted service upon the Defendant pursuant to Rule 4.030 of the Minnesota Rules of Civil Procedure, which permits service upon a corporation "by delivering a copy to an officer or managing agent, or to any other agent

authorized expressly or impliedly or designated by statute to receive service of summons." Plaintiffs contend that Mr. Baxter was an "agent authorized expressly or impliedly . . . to receive service of summons" as set forth in that rule. Defendant contends that leaving the Summons with the receptionist does not constitute service upon Mr. Baxter, and in any event, Mr. Baxter does not qualify as an agent with authority to accept service.

1. Was The Attorney Served?

The only facts before the Court with respect to alleged service of the Summons and Complaint on the attorney are in the Affidavit of Lawrence Crosby (Docket No. 23). Mr. Crosby states that on June 14, 1994, he "messengered by Midwest Delivery a copy of the Summons and Complaint to Mr. Michael Baxter, Esq., the attorney for New Hampshire Insurance Company." There is no evidence in the form of Affidavit from Midwest Delivery or otherwise to establish that the messenger in fact served Mr. Baxter. The Court cannot find as a matter of fact that Mr. Baxter was actually served with the Summons and Complaint in the absence of proof.

2. Actual Notice.

In Defendant's Memorandum, Mr. Baxter acknowledges that at some time he received a copy of the Summons and Complaint. Plaintiffs contend that this actual notice is sufficient to constitute service. They rely upon the decisions of the Minnesota Court of Appeals *in Amdahl,* 484 N.W.2d 811 (Minn. Ct. App. 1992), and the Minnesota Supreme Court in Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988). Those cases are not helpful to the Plaintiffs under the facts of this case, however. In Amdahl, the Court did not find that actual notice was sufficient in the absence of service. Rather, service was found to have been made upon a person who was in fact an agent. In Thiele,

the Court found that upon the attorney by leaving a copy at his office. (FN1) The issue of actual notice as a substitute for service of process was considered by the Minnesota Court of Appeals in Coons v. St. Paul Companies, 486 N.W.2d 771 (Minn. Ct. App. 1992). The Court concluded that actual notice did not suffice. Service of process was required. In Coons the issue arose in the context of attempted service under Rule 4.05, but there is no reason to conclude that a different standard would apply where personal service upon an alleged agent is attempted.

Mr. Baxter had acted on behalf of the Defendant in proceedings in bankruptcy court, and had negotiated on behalf of Defendant over a period of time. He continued to represent the Defendant, and has appeared in this action on behalf of Defendant. Plaintiffs allege that under these circumstances, he should be considered an agent within the meaning of Rule 4.03(c). Since he was not served, and his eventual actual notice is insufficient, the Court need not reach this issue. However, it has found no authority which would warrant a determination that Mr. Baxter was the agent of Defendant upon the facts presented to the Court on this Motion. In Amdahl, 484 N.W.2d at 814, the Court was presented with substantially different facts. The job description of the person served was to control suits and the legal paper flow within the company. She had been accepting service of process for 1 0 years before the service in question, and continued to do so afterwards, according to a regular company procedure. There is no such evidence in this case. The other cases relied upon by Plaintiffs do not support their position. In Mav v. Barge, 633 S.W.2d 376, (Ark. 1982), the attorney acknowledged that he had accepted service for the defendant. Craig v. Southeastern Fidelity Ins. Co. 1 400 So.2d 289 (La. Ct. App. 1981) did not involve commencement of an action.

D. Waiver.

It may be seen by the preceding discussion that this Court would lack jurisdiction by reason of insufficiency of service of process, unless the Defendant had waived that issue. Waiver in fact occurred in this case. After the matter was removed, Defendant filed an Answer. The Answer properly preserved the issue of insufficiency of service of process. However, Defendant later moved the Court for permission to file a Counterclaim, and has since served and filed that Counterclaim. This voluntary invocation of the jurisdiction of this court gives the Court jurisdiction over the Defendant. Ceminsky v. Mardell, 385 N.W. 888, 891 (Minn. Ct. App. 1986); Morehart v. Furiev, 182 N.W. 723, 724 (1921).

II. STATUTE OF LIMITATIONS.

A. Was the Action Commenced Within Two Years?

Defendant seeks summary judgment upon the grounds the suit was not commenced within two years, as required by the insurance agreement The contract provides:

"No one may bring a legal action against us under. this coverage Part C unless:

1. There has been full compliance with all of the terms of this coverage part; and
2. The action is brought within two years after the date on which the direct Physical loss or damage occurred."

Paragraph 26 of Plaintiffs' Complaint acknowledges this provision: 'The policy requires the insured to bring suit within two years of the date of actual loss." The actual loss occurred on June 16, 1992, so the action must have been commenced before June 16, 1994 or it is barred by the statute of limitations"

In federal court, actions are deemed commenced at

the time of filing of the Complaint. (FN2) Federal Rule 3. Were we to apply the federal rule in this case, the Motion for Summary Judgment would have to be denied upon the ground that there is a genuine issue of material fact since there is no evidence before this Court as to the date on which the Complaint was filed in state court. However, in diversity cases like this one, commencement" of an action for purposes of applying the statute of limitations is governed by state law. Fischer v. Iowa Mold Tooling Co. Inc , 690 F.2d 155, 157 (8th Cir. 1982); Walker v. Thielen Motors, Inc., 916 F.2d 450, 451 (8th Cir. 1990); Walker v. Armco Steel Corp., 446 U.S. 740 (1980). (FN3) We thus apply Minnesota law in determining the date of commencement of this action.

The Court has been unable to find any authority in Minnesota or elsewhere which determines the date of commencement where there is a failure of service of process, and jurisdiction is attained by reason of waiver. Rule 3 of the Minnesota Rules of Civil Procedure specifies when an action is commenced. (FN4) None of those provisions applies directly, although Rule 3.01 (b) comes the closest to the facts presented by this case, if one construes the waiver of jurisdiction as an "acknowledgment" of service.

Until Defendant waived the service of process, the action had not been commenced under the Minnesota Rules. The first act which Defendant undertook with respect to the Complaint was the filing of the Petition for Removal on July 7, 1995. The filing of the petition for removal did not waive the issue of service of process, but even if it had, that waiver took place after the critical date of June 16, 1994. Defendant filed its Counterclaim in December of 1994, and jurisdictional issues were thereupon waived. The only manner in which *it might* be said that the action was

commenced by June 16, 1994 would be if the waiver of the jurisdiction were to relate back to an earlier date which precedes June 16, 1994. There are two difficulties with that path. The first is that there is no clear date which could be established as to which the initial jurisdiction may be said to refer. The Court finds no legal basis upon which to hold that where a defendant waives its objection to jurisdiction by service of a counterclaim, the action will be deemed commenced on the date on which ineffective service was first attempted. Not only is there no legal basis for such a rule, it would lead to further confusion. In this case, for example, the Plaintiffs mailed a copy of the Summons and Complaint to New York on June 13, 1994. On June 14, 1994, they sent a messenger over to the office of Mr. Baxter. On what date was the action commenced? Certainly it *may* not be said that the waiver relates back to <u>any</u> action on the part of a Plaintiff indicating that it wishes to commence an action.

The better rule, it is believed, is that where service of process is not effected upon the Defendant, but where a defendant waives that defect, an action is commenced for statute of limitations purposes on the date upon which the action resulting in the waiver took place. From a policy point of view, this avoids the confusion which would otherwise result if courts were to grapple with determining just which acts of a plaintiff were sufficient for purposes of relation back. This is also closer to the framework of Minnesota Rule 3.01 (b), which deems an action commenced on the date of acknowledgment of service." Finally, to the extent that waiver involves any voluntariness on the part of the defendant, it is clear that Defendant in this case did not intend to waive its claim that the action was not commenced within the time required by the insurance agreement, and Defendant never took any action after attempted service

which would have suggested to Plaintiffs that they had in fact succeeded in serving the summons and complaint.

Since the action was not brought within the two years specified in the policy, it should be dismissed, unless the policy terms were waived, or the two year period is unreasonably short.

B. Did Defendant Waive the Policy Terms?

Plaintiffs argue that Defendant waived the policy provision at issue by filing its Answer and Counterclaim, and by continuing to negotiate with the Plaintiffs. Plaintiffs point out that one party to a contract may waive a condition precedent which exists for that parties' own benefit. Steinhilber v. Prairie Pine Mut. Ins. Co., 533 N.W.2d 92 (Minn. Ct. App. 1995); Ar)pollo v. Reynolds, 364 N.W.2d 422, 424 (Minn. Ct. App. 1985). It is also true that where a party leads the other party to believe that performance of the condition will not be required until it is too late to perform, the condition will not be enforced. E.g., Wolff v. McCrossan, 296 Minn. 141, 21 0 N.W.2d 41, 44 (Minn. 1973).

In Wolff v. McCrossan, 21 0 N.W.2d 41 (Minn. 1973), defendant assured plaintiff that there was no hurry and that plaintiff had time to respond to a third party's offer. The court found the oral representations of defendant acted as a waiver of the contractual time limitations. Id. at 44. In Appollo v. Reynolds, 364 N.W.2d 422 (Minn. Ct. App. 1985), the parties signed a purchase agreement containing a specific closing date on which the purchase of a house was to take place. The seller did not complete the house until after the scheduled closing date, by which time the interest rate had risen. The seller argued that, pursuant to a condition in the agreement, the contract had been temporarily suspended because the interest rate was too high for the buyers to complete the contract at the time of the

scheduled closing. The court found that the sellers had waived this condition in the agreement because they had continued to demand performance of the agreement. Id. at 424. In Steinhilber v. Prairie Pine, 533 N.W.2d 92 (Minn. Ct. App. 1995), the parties entered an insurance appraisal process which was specified by contract. The appraisers suspended their meeting only fifteen days before the limitations period ended to allow the parties to pursue their claims in court. Under these circumstances, the court found there was a genuine issue whether respondent continued to exercise rights under the contract and whether respondents actions had caused appellant to believe that commencement of suit would not be required within the limitations period. Id. at 93.

In the present case, Plaintiffs argue that Defendant waived the limitations period by continuing to negotiate with Plaintiffs up until, and after, the expiration of the limitations period. However, Defendant made no assurances to Plaintiffs regarding the running of the limitation period. Unlike the parties in Steinhilber and Apollo, the negotiations in this case were not pursuant to any provisions of the insurance agreement, i.e. Defendant did not demand performance of the agreement, such as compliance with an arbitration or mediation clause. In addition, Defendant did not cause Plaintiffs to believe that commencement of suit would not be required within the limitations period. Plaintiffs, knowing that the limitations period expired on June 16, 1994, attempted to commence suit by serving process on Defendant on June 14, 1994. Under these circumstances, the court finds Defendant did not waive the limitations provisions in the insurance policy.

C. The Statute of Limitations Was Not Unreasonably Short.

If the statute of limitations set forth in a policy Is

unreasonably short, it will not be enforced. Henning Nelson Construction Co. V. Fireman's Fund American Life Ins. Co., 383 N.W.2d 645, 650 (Minn. 1986)(one year statute of limitations too short). No genuine issue of material fact is raised as to this issue. As Defendant points out, the Minnesota legislature has specified a two year statute of limitations under the Minnesota standard fire insurance policy. M.S.A. ss 65A.01. No reason or evidence appears as to why the statute of limitations under the policy in this case is so unreasonably short as to be invalidated by this Court. Plaintiffs were able to file proofs of claim within the period; more than $450,000 was paid out during the period; claims were filed and determined in bankruptcy court; the parties were not unaware of their rights and responsibilities under the policy, nor the fact or consequence of the loss.

Since the action should be dismissed for failure to comply with the statute of limitations, it is unnecessary to consider the other grounds urged by Defendant. The court considers them only briefly below.

III. OTHER DEFENSES

A. Standing

Defendant contends that Plaintiffs lacks standing to bring this action. They show that there is a provision in the policy which forbids assignment without written permission, and that they have not given permission. Plaintiffs show that Plaintiff Clark Field was a named insured under the original application for the policy, and that his rights are not dependent upon assignment. A genuine issue of material fact is thus raised. There is also a genuine issue of material fact as to whether defendant waived its right to require written consent by failing to object at the time of assignment. See in re Estate of Sangren, 504 N.W.2d 786 (Minn. Ct. App. 1993). The Court in Sangren also suggested that the assignment in that case, like the

assignment here, might better be construed as an assignment of the proceeds of the policy rather than an assignment of the right to insurance protection. As such, it would be merely be subject to ordinary rules of assignment, which would not defeat Plaintiffs' claim.

B. Equitable Estoppel

Defendant paid $453,870 into the U.S. Bankruptcy Court "pending determination of the rights of the various parties." The Bankruptcy Court had ordered on October 19, 1992 that "upon payment of the funds into the Bankruptcy Court, this Court shall provide New Hampshire Insurance Company ... a release from all claims for funds deposited into the Bankruptcy Court and that upon disbursement of the funds of New Hampshire by the Trustee of the Bankruptcy Court, New Hampshire shall be released from all claims arising under this policy as a result of the July 19, 1992 tornado at Clarkfield." Proceedings were then had in Bankruptcy Court in the nature of an interpleader, followed by a settlement among the parties, evidenced by a written Stipulation of Settlement, which was approved by the Bankruptcy Court on October 1, 1993.

Defendant argues that its liability under the policy has been extinguished by this proceeding, and that it is entitled to collateral estoppel against all further claims under the policy, based upon the language of the 1992 Order of the Court. Plaintiffs argue that it was intended that the $453,870 payment was not a payment in full, but only a partial payment. They point out that the proof of claim upon which that sum was paid expressly refers to that sum (prior to the deductible) as "a partial payment."

Even if the Court were to accept the Defendant's construction of what was intended by the 1992 Order, the 1993 final Order in this case does not contain the release language that Defendant relies upon. There may indeed be

additional evidence or procedural history in that case which would permit the Court to reach a conclusion as to the collateral estoppel effect to be given to the Order but that is not possible on the record before the court.

C. Negligence and Bad Faith Refusal to Settle.

Counts Two and Three of Plaintifrs Complaint seek to recover on theories of Negligence and Bad Faith Refusal to Settle. These allegations do no state a claim upon which relief may be granted. See Haagenson v. National Farmers Union Property & Cas. Co., 277 N.W.2d 648 (Minn. 1979); Olson v. Rugloski, 277 N.W.2d 385 (Minn. 1979); Wild v. Rarig, 302 Minn. 419, 234 N.W.2d 775 (1975), cert. denied 424 U.S. 902 (1976).

IV. PLAINTIFF'S MOTION TO COMPEL

Plaintiffs have moved the Court to compel the disclosure of the statement of Ken Envaldson. The statement of Mr. Envaldson is material to issues raised by the counterclaim of Defendant. Mr. Envaldson will be a witness at trial. Mr. Envaldson allegedly has submitted two different bids for doing the same work. Defendant resists production and contends that the statement is work product. The Court has been presented with no facts upon which it could make such a finding. In any event, Defendant has made a substantial showing of need for these materials and is unable to obtain the equivalent by other means. A prior statement of a witness is material in any case, but particularly in this case, given the showing by Plaintiffs: A clear, unredacted written copy of all statements by Mr. Envaldson shall be provided to counsel for plaintiffs within 14 days of this Order. If a tape recording was made of the statement, counsel for Plaintiffs shall be given an opportunity to listen to that recording, and shall also be given an opportunity to review the original of all statements produced, all within 14 days of the date of this Order.

BEST AVAILABLE COPY

For the foregoing reasons it is hereby ordered that:

1. Defendant is entitled to a summary judgment dismissing Plaintiff s Complaint. There is no genuine issue of material fact, and Defendant is entitled to a judgment of dismissal of Plaintiffs Complaint as a matter of law. The Court expressly declines to order the entry of judgment thereon.

2. Plaintiffs' Motion to Compel is granted. Defendant shall provide to Plaintiffs all statements of Ken 7-nvaldson and related materials.

IT IS SO ORDERED.

Dated: November 22, 1995

JOHN M. MASON
United States Magistrate Judge

FN1: In Thiele, the attorney was a party. In this case, the attorney is alleged to be the agent of a party. No different rule would apply.

FN2: We do not overlook that the contract specifies that the action must be "brought within two years. The parties have not argued that there is a difference between the term "brought" and the term recommenced' and we think the contract language is free from ambiguity on this point.

FN3: By contrast, in diversity cases where there is a direct conflict between a federal rule of civil procedure and a state rule, the federal rule will prevail. Hughes v. Mayo Clinic, 834 F.2d 713 (8th Cir. 1987) cert. denied, 487 U.S. 1210 (1988) ("commencement" of action for purposes of applying special rules in medical malpractice action is governed by Federal

Rule 3); Modem Computer Systems, Inc. v. Modem Banking Systems, Inc., 871 F.2d 734, 737 (8th Cir. 1989) (federal standards for injunctive relief are applied).

FN4: Rule 3.01 COMMENCEMENT OF THE ACTION. A civil action is commenced against each defendant:

(a) when the summons is served upon that defendant, or

(b) at the date of acknowledgment of service if service is made by mail, or @ when the summons is delivered to the sheriff in the county where the defendant resides, for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

MW AG, INC., et al., CIVIL NO. 3-94-775

Plaintiffs,

v. ORDER

NEW HAMPSHIRE INSURANCE COMPANY,

Defendant.

The above matter came on for hearing before the undersigned on April 3, 1996 upon the Motion by Defendant New Hampshire Insurance Company to Dismiss Counterclaim, For Entry of Judgment and for Award of Costs [Docket Nos. 34 and 38]. The parties have duly waived their right to proceed before a Judge of the United States District Court and have consented to have a United States Magistrate Judge conduct any and all proceedings in the case, including the trial, and the entry of a final judgment, pursuant to the provisions of 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure. It was so ordered by District Court Judge Michael J. Davis.

The Court, being duly advised in the premises, upon all of the files, records and proceedings herein, now makes and enters the following Order:

IT IS HEREBY ORDERED:

1. The Complaint of Plaintiffs may be, and

hereby is, dismissed with prejudice;

2. The Motion of Defendant to Dismiss its Counterclaim is granted. The Counterclaim of Defendant may be, and hereby is, dismissed with prejudice; and

3. Defendant is entitled to a judgment against Plaintiffs for its costs herein, in an amount to be taxed by the Clerk of Court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 4, 1996

JOHN M. MASON
United States Magistrate Judge

MEMORANDUM

By Order dated November 22, 1995, this Court determined that there was no genuine issue of material fact, and Defendant was entitled to a judgment as a matter of law [Docket No. 33]. It determined that judgment should not be entered, because of the pendency of the Counterclaim of Defendant. The Court has now granted Defendant's Motion to Dismiss its Counterclaim. This disposes of the remaining claims at issue herein, and entry of judgment is appropriate.

Defendant is the prevailing party, and is entitled to judgment for its costs and disbursements, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.

J.M.M.